WARAS BENO

v.

KHOO HANG CHUA & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[SUIT NO. 101 OF 1985]
13 JUNE 1991

DAMAGES: *Supra condular fracture of left femur - Healing with gross malposition - Femur - Damage to the articular surface of the lower end - Osteoarthritis - Limp - 1.5 cm shortening of left lower limb - Wrist - Fractures of the lower ends of the radius and ulna (L) - Slight displacement of the lower end of the radius on the radial side - Stiff painful right wrist - Effect of - Inability to engage in physical work involving use of injured limbs - Permanent disabilities - Loss of earnings - Construction worker - Evidence not challenged by defence - Inability to work for 1½ years - Loss of future earnings - 36 years old - 1/3 contingencies - Years of purchase of diminished earnings - Multiplier multiplicand - Interest.*

TORT: *Rear-end collision - Motorcycle crashing into rear of bus - Testimony of parties - Credibility - Whether defendant exercised due care and attention when he applied his brakes - Proper look out - Whether plaintiff following the bus too closely - Contributory negligence - Highway Code, r. 22.*

An accident occurred on 14 February 1984 when the plaintiff whilst riding his motorcycle collided into the back of a motor bus driven by the 1st defendant.

The plaintiff testified that the collision occurred as a result of the bus applying its brakes suddenly, while the 1st defendant stated that the collision occurred as a result of the motorcyclist crashing into the bus's rear as a result of him slowing down to avoid an oncoming vehicle which had encroached into his path.

Held:

[1] Reliance could not be placed on the plaintiff's version as to how the accident occurred in light of his admission that he could not remember how the accident occurred and on the fact that he made no mention of the bus overtaking him in his police report. On the other hand, the police report lodged by the defendant corroborated his testimony.

[2] It was clear from the evidence that the defendant had failed to notice the plaintiff on his motorcycle following the bus. This indicated that he had failed to watch his rear-view mirror and thus failed to keep a proper look out before the accident.

[3] Further, the defendant must have applied his brakes quite abruptly and without any warning to vehicles following; therefore there was negligence on his part in stopping the bus as he did.

[4] It was obvious too that the plaintiff must have been following the bus too closely in breach of r. 22 of the Highway Code and thus did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. In the circumstances, his liability was assessed at 80% and the 1st defendant's at 20%.

[Order accordingly.]

Cases referred to:
N. Vijaya Kumar s/o Narayanasamy v. Voon Chen Lim [1987] 3 MLJ 255 ***(cit)***
Chan Lye Huat v. Tan Ong Kong [1985] CLJ (Rep) 430 ***(cit)***
Lee Eng Beng & Anor. v. Torairajah & Ors. [1987] 2 MLJ 121 ***(cit)***
Victor Alphonse Sebastian & Ors. v. Lee Ah Lek 2 MLJ xxi ***(cit)***

Legislation referred to:
Highway Code, r. 22

For the plaintiff - R.A. Kumar; M/s. John Ang & Jega
For the defendants - S.V.K. Singham; M/s. Singham & Co.

JUDGMENT

LC Vohrah J:

The plaintiff's claim is for damages for personal injuries and consequential loss suffered by him as a result of the alleged negligence of the first defendant in driving a motor-bus No. JAG 4841 along the Kota Tinggi-Mersing road.

The accident occurred on the morning of 14 February 1984 when the plaintiff whilst riding his motor-cycle No. JAM 8977 in the direction of Mersing collided into the back of a motor bus driven by the first defendant at the 13 milestone.

The evidence-in-chief of the plaintiff was that he was returning to his house at Kampong Ladang Ubi at the 18 milestone when along a straight road at the 13 milestone he saw a motor-lorry approaching him from the opposite direction. After the lorry had passed him a motor-bus overtook him from behind and after it had proceeded 10 feet stopped suddenly whereupon he swerved to his right but failed to avoid a collision with the offside rear of the bus where the brake light was situated. At the time the bus overtook him he was about 4 feet from the edge of the road. He was unconscious after the accident and regained consciousness only after his admission into the hospital in Johore Bahru.

In his police report AB-9 made at 10.35 p.m. on the same day he stated that before the collision he was tailing the motor-bus and when presented with this statement in cross-examination he said he was dizzy and did not feel well at the time he made his report. In re-examination he stated he just could not remember how the accident occurred.

The plaintiff called no witnesses in support of his case.

The first defendant's version was as follows. At the time in question his bus was carrying passengers and he was driving in the direction of Mersing. He was then travelling at about 30 m.p.h. along a straight road up a slope in an uninhabited area reserved as forest land when he saw a motor-car approaching him from the opposite direction. It had encroached into his path as it was in the process of overtaking a motor lorry. He then slowed down to a speed of about 15 m.p.h. when all of a sudden he heard the sound of a bang coming from the rear of his bus. He stopped his bus and got out and found a motor-cycle lying on the road on its side behind the bus with the rider beside it. He also discovered that the rear bumper of his bus on the offside was dented and the rear offside signal light broken. His police report AB-8 made within half an hour of the accident appeared to accord with what he had stated in evidence.

The first defendant was also the only witness for his case.

In the light of the plaintiff's admission in re-examination that he could not remember at all as to how the accident occurred and his statement that he thought the bus had overtaken him and of the fact that no mention of this overtaking was made in his police report AB-9, I do not think too much reliance can be placed on his version of the accident. On the other hand, the oral testimony of the first defendant in the light of his police report AB-8, which, in my view, went to corroborate his testimony, would appear to indicate that the accident occurred as a result of the plaintiff's motor-cycle colliding into the offside rear of the bus when the first defendant applied his brakes upon seeing the approaching car encroaching into his path whilst overtaking a motor-lorry. The question I have to decide is whether the first defendant did or did not exercise due care and attention when he applied his brakes at the time he said he did. It is clear from his evidence that he had failed to notice the plaintiff on his motor-cycle following the bus. This would indicate that he had failed to watch his rear-view mirror and thus failed to keep a proper look-out before the accident. Further, if he had slowed down gently from 30 m.p.h. to 15 m.p.h., as he stated, the plaintiff, in my view, would have been able to avoid the collision since he had been following the bus for some distance. It is obvious, therefore, that he must have applied his brakes quite abruptly and without any warning to vehicles following and I accordingly find that there was negligence on the part of the first defendant in stopping his bus as he did. It is obvious too that the plaintiff must have been following the bus too closely in breach of r. 22 of the Highway Code and thus did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. In the circumstances of this case I would assess his responsibility at 80% and the first defendant's at 20%.

Now to the question of damages. The medical report of the consultant orthopaedic surgeon at AB-4 shows that he sustained a mild head injury from which he has fully recovered. He however sustained a supra-condular fracture of the left femur which has since healed but with gross malposition. He has also sustained damage to the articular surfaces of the lower end of the femur in relation to the tibia indicating that he would suffer from osteoarthritis in this joint in time to come. He is unable to stand or walk for long periods or climb ladders or stairs because of this condition which will progressively worsen. He also walks with a limp as a result of 1.5 cm shortening of his left lower limb. Additionally, in his left wrist he sustained fractures of the lower ends of the left radius and ulna with very slight displacement of the lower end of the radius on the radial side. There is also evidence of damage to the lower articular surface of the radius and osteoarthritic changes indicating that he has a stiff, painful left wrist which would get progressively worse when it is subjected to physical stress. The medical verdict is that he will not be able to engage in physical work involving the use of the injured limbs nor in any occupation requiring him to stand or work for long periods. His liabilities are likely to be permanent. On the basis of the authorities submitted, *N. Vijaya Kumar s/o Narayanasamy v. Voon Chen Lim* [1987] 3 MLJ 255, *Chan Lye Huat v. Tan Ong Kong* [1985] CLJ (Rep) 430, *Lee Eng Beng & Anor. v. Torairajah & Ors.* [1987] 2 MLJ 121 and *Victor Alphonse Sebastian & Ors. v. Lee Ah Lek* 2 MLJ xxi, I would award general damages for pain and suffering and loss of amenities, after taking into account overlapping, in the sum of RM50,000.

As regards special damages for loss of earnings, the only evidence as to his earnings now and before the accident is the oral testimony of the plaintiff himself. I have no reason to doubt that he earned about RM400 per month working on a construction site at the time of the accident nor that he is now earning RM250 per month as a generator-operator. His evidence on this score was never challenged by the defence. Nor was his evidence that he could not work for 1½ years as a result of his injuries. In the circumstances, the plaintiff's

actual loss of earnings for this period of 18 months from the date of the accident at RM400 per month and that for the period thereafter until today of 70 months at the rate of RM150 (RM400 - RM250) per month would amount altogether to RM17,700. Next the plaintiff's loss of future earnings by reason of his diminished earning capacity as a result of his injuries. He is now 36 years old and allowing him a working life up to 55 years of age and then deducting from this period of 19 years the usual figure of one-third for contingencies, the plaintiff will have 13 years' purchase of diminished earnings which I estimate at RM200 per month taking into account prospective increases in his wages. According to the annuity table a multiplier of 13 and a multiplicand of RM200 will furnish the sum of RM22,545. The itemised special damages have been agreed at RM518.

In summary, the damages to be awarded on the basis of 100% liability are as follows:

(1) General damages: RM50,000.

(2) Loss of actual earnings: RM17,700.

(3) Loss of future earnings: RM22,545.

(4) Itemised special damages: RM518.

The plaintiff will be entitled to 20% of the damages above awarded. The general damages will bear interest at 8% per annum from the date of the service of the writ. The special damages for loss of actual earnings will bear interest at 4% per annum from the date of the accident. The damages for future loss will bear no interest. The itemised special damages will also bear interest at 4% per annum from the date of the accident. The plaintiff will be entitled to the costs of this suit.

Also found at [1991] 3 CLJ 2605